MORONGO BAND OF MISSION INDIANS

A SOVEREIGN NATION

TRIBAL CASE STUDY: SECTION 1813 REPORT

Submitted by Maurice Lyons,
Tribal Chairman, Morongo Band of Mission Indians
Banning, California

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Our people have occupied the mountains and valleys of our region of Southern California for thousands of years. Our first recorded encounter with Europeans occurred in 1775, a year before the United States was born.

Our reservation was created by Executive Order in 1876 and then by trust patent issued under the Mission Indian Relief Act to protect our land "for the exclusive use and benefit" of the members of the tribe.

It is our experience that those words – "exclusive use and benefit" – haven't always meant what they seem to say.

Over the last 130 years, our lives on the land have encompassed a broad arc of evolving federal policy – with many reversals and false starts along the way.

Especially in the area of energy development and the granting of rights of way, we have experienced some of the worst consequences of private exploitation and federal practices that sought neither our counsel nor our consent when it came to giving over broad swaths of our trust lands to others for energy, water and highway development.

Eighty-six years ago, Congress conditioned the inclusion of tribal reservation lands in federally-licensed energy projects upon a finding that such inclusion would not *"interfere or be inconsistent with the purpose for which such reservation was created or acquired."*

Nearly sixty years ago, the federal government recognized that tribal governments should have the right to consent to the use of their lands for energy and transportation-related projects and that the tribes should receive adequate compensation for that use.

Despite our early harsh experiences with the exercise of federal authority in this area, we believe that preserving the right of tribal governments to consent to the use of their lands for the benefit of others through negotiation, rather than coercion, is today producing greater benefits for all concerned.

Our own experience demonstrates what can be achieved when tribal governments and utility companies cooperate.

But today all of that progress and the enlightened policies that made it possible are under attack.

The Section 1813 study called for in the Energy Policy Act of 2005 raises two fundamental questions:

- **Should the rights of more than 567 tribal governments in 28 states throughout the country be suspended at the behest and for the primary benefit of one private utility – the El Paso Natural Gas Company?**

- **Should the Secretary of the Interior be empowered to seize portions of our reservations, without the consent of the people who own it and live on it in order to turn that land over to corporations for their own private profit?**

These are the questions that this case study of the Morongo Band's experience with these issues will try to answer.

Morongo Rights of Way - Before the Right of Tribal Consent

"The utmost good faith shall always be observed towards Indians; their land and property shall never be taken from them without their consent."

That was the promise that Congress made at the founding of America in 1789. But by the beginning of the Twentieth Century a different ethic was in place.

The business of the Bureau of Indian Affairs by this time was business – big business.

Federal Indian policy was not based on custodial or stewardship responsibilities toward the tribes.

It aimed instead at forcibly assimilating Indian people by breaking up tribal reservations and turning over their lands to non-Indians for other, frequently commercial uses.

The government officials in charge of implementing these policies never doubted that there would be hardships for the tribes as their reservations were carved up for rights of way to benefit railroads, water and highway developers and energy companies.

As William A. Jones, Commissioner of Indian Affairs from 1897 to 1904, observed in his annual report in 1901,

" There will be many failures and much suffering…for it is only by sacrifice and suffering that the heights of civilization are reached."

His successor, Francis E. Leupp, commissioner from 1904 to 1909, likewise acknowledged that many Indians would lose their property. But he took the view that they should be grateful for their loss in the long run*:*

"You never saw the man, red, white or of any other color, who did not learn a more valuable lesson from one hard blow than from twenty warnings."

This was the policy that Leupp set in motion at a time when tribal consent was not required for a right of way. The words are taken from his Report of the Commissioner of Indian Affairs in 1905. Reading them now may help people today to understand the way we view these issues, what our experience has been, and how our own lives, the lives of our children, and the lives of our parents, grandparents and great-grandparents have been affected by these attitudes.

"Perhaps in the course of merging this hardly used race into our body politic, many individuals, unable to keep up the pace, may fall by the wayside and be trodden underfoot. Deeply as we deplore this possibility, we must not let it blind us to our duty to the race as a whole. It is one of the cruel incidents of all civilization in large masses that some – perchance a multitude – of its subjects will be lost in the process. But the unseen hand which has helped the white man through his evolutionary stages to the present will, let us trust, be held out to the red pilgrim in his stumbling progress over the same rough path."

It was in that spirit that the first right of way for power lines was driven through our reservation in 1914 - a 90-kilovolt line constructed without permission, consultation, or even official federal authorization.

At first, there was no compensation at all provided to the tribe for this intrusion.

That was corrected several years later, when the owner of the line sought a license from the Federal Power Commission (FPC), and the FPC set the level of compensation at a total of $5.00 a year.

That amount was later increased to $5.29 - about one and a half cents a day.

Morongo was required to share those funds with another tribe whose reservation had also been crossed by the transmission line.

For more than 100 years, federal and state agencies, public and private utilities and other entities planning and building electric transmission lines, oil and gas pipelines, highways, water aqueducts, railroads and telecommunications facilities have regarded Morongo's lands as the path of least resistance and least cost, with the result that some of the best lands on the Morongo Reservation have been preempted from tribal use for minimal compensation.

Much of the Morongo Indian Reservation is made up of hilly and mountainous terrain. It is in the small, relatively flat portions of the reservation that our members must live and this is where the greatest opportunities exist for tribal economic development. But this is also the very lands the utilities want to take.

The Morongo Indian Reservation today is crossed by at least seven high-voltage electric transmission lines, a major interstate natural gas pipeline, a petroleum pipeline, the aqueduct carrying water from the Colorado River to Southern California, fiber optic telecommunications facilities, a railroad and an interstate highway.

When researchers in the late 1970s surveyed other tribes in the area about their attitudes toward the Devers-Palo Verde and Lamb Canyon-Mira Loma High Voltage Transmission Lines, Morongo was mentioned often – as an example of what other tribes did not want to happen to them.

The first 230kV electric transmission line across the Morongo Reservation (Devers-San Bernardino No. 1) was built in 1945, but was not licensed by the Federal Power Commission as part of Project No. 2051until 1954. Morongo was never consulted about the construction of that line.

There is no record that the FPC ever consulted with Morongo about retroactively including reservation lands in the license for this project Nor did the FPC consult with Morongo pursuant to 16 U.S.C. §803(e) about the reasonableness of fixing annual compensation to the tribe at $31.80 a year for a right of way nearly six miles long and 300 feet wide.

That's about eight cents a day.

Morongo Rights of Way - After the Right of Tribal Consent

By the 1940's, federal policies toward the reservations had evolved into what the Bureau of Indian Affairs characterized as "ruthless benevolence or benevolent ruthlessness."

In 1948, however, the rules began to change when Congress approved a comprehensive right of way law for Indian land. Tribal consent was required for rights of way, and fair market value was established as the minimum level of compensation for all tribes.

What happened next with the eight-cents-a-day power line provides a good illustration of how attitudes changed in the years that followed and a more equitable spirit of cooperation came into play.

When the original FPC license for this line expired in 1995, it could not be relicensed by FERC because it no longer was within FERC's licensing jurisdiction.

The company had determined that it was no longer a "primary" line. Nonetheless, the Southern California Edison Company continued to operate the line, and for several years simply ignored Morongo's request that a new right of way agreement be negotiated.

Only after Morongo threatened to initiate litigation seeking to eject the line from the Reservation did Edison agree to negotiate an agreement under which Morongo would issue a tribal license to allow Edison to continue using the line in its present location until at least 2010. The license committed the parties to commence negotiations concerning the future of the line beyond 2010 in 2008.

In 1955, the Department of the Interior, Bureau of Land Management granted a 50-year easement to the California Electric Power Company for a 115kV line -- the Banning-Garnet-Maraschino line (BGM). Little or no compensation was received for that easement. That line, too, is now owned and operated by Edison.

The original at easement for BGM was due to expire in 2005. To avoid a recurrence of the situation that arose when the easement for the Devers-San Bernardino No. 1 line expired in 1995, Morongo agreed to license the BGM line prospectively, commencing upon expiration of the original easement in 2005, and continuing until 2010, with the same provision for renegotiation commencing in 2008 as the license for the Devers-San Bernardino No. 1 line.

The BGM line currently is being operated under the Morongo tribal license. Although the tribal license to Edison does not obligate Morongo to engage in negotiations

concerning the future of Edison's facilities on the reservation until 2008, Edison has proposed a project (Devers-Palo Verde No. 2 -- "D-PV2") that would necessitate renegotiation of not only the Morongo tribal license, but also other rights of way across the reservation, long before that. Those negotiations, which will require Morongo to allocate significant financial and staff resources, and will force an acceleration of Morongo's reservation planning process, are just now getting under way.

In 1960, the Department of the Interior granted a 50-year easement to the California Electric Power Company for two 115kV lines, in consideration for which Morongo received about $21,000. When Edison acquired the California Electric Power Company, the facilities were modified to operate as a single circuit 230kV line (Devers-Vista No. 1). That easement will also expire in 2010.

In 1969, The Bureau of Indian Affairs granted to Edison a 50-year, 200-foot wide, 5.26 miles long easement for two 230kV circuits, Devers-San Bernardino No. 2 and Devers-Vista No. 2, for $149,875. This easement overlaps the earlier easements for the Devers-San Bernardino No. 1 and Devers-Vista No. 1 230kV lines, and also includes a second 115 kV line, for a total width of 450 feet.

In 1997, Edison requested that Morongo permit the installation of a fiber optic telecommunication line on its Devers-Vista No. 1 facilities. After good-faith negotiations, Morongo consented to the amendment of the existing easement to allow the installation of that line for a one-time payment of $535,000, which both parties agreed, was fair consideration.

In 2005, Edison petitioned the California Public Utilities Commission for a certificate of public convenience and necessity under which, among other things, Edison would convert the single circuit Devers-San Bernardino No. 1 and Devers-Vista No. 1 230kV lines through Morongo into one reconductored double-circuit 230kV line to be installed near the edge of its existing easement, reconductor the existing double-circuit 230kV line, and move the existing 115kV line that is within the existing corridor, so as to increase the capacity of its system west of Devers and also leave room for construction of a 500kV line (either single or double circuit, although no such line currently is being proposed) down the middle of the corridor.

Morongo's consent to these changes in Edison's facilities is required, because the easement for the Devers-Vista No. 1 line and the tribal license for the Devers-San Bernardino No. 1 and BGM lines will expire in 2010, and the other easements will expire in 2019, long before Edison would recover the costs incurred in upgrading these facilities.

Edison has sought Morongo's consent to its proposed modifications/improvements, and recently submitted its first formal, detailed proposal for a new 50-year agreement. Negotiations are in progress.

The point is that the process is working.

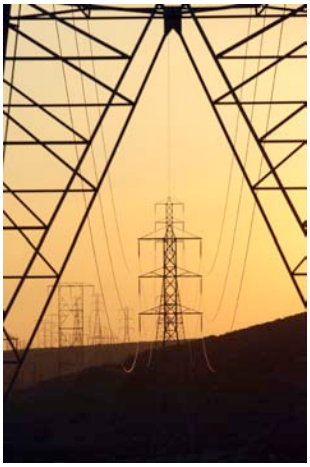
Edison and Morongo have been conducting good faith negotiations that have produced fair and equitable agreements.

New facilities are being planned. And no services have been delayed, disrupted or denied.

The Threat of Section 1813

This is the kind of progress that the proponents of the 1813 study want to turn back. They want to return to what they may consider "the good old days" -- when tribal consultation and consent were not required, and the federal government fixed whatever the level of compensation would be.

The El Paso Natural Gas Company, with the support of the Edison Electric Institute and other individual utilities, is attempting to use the study called for in Sec. 1813 as a springboard for legislation that would:



• Take away the existing right of all tribal governments to consent to the use of their lands in trust;

• Empower the federal government to impose rights of way across reservations for the profit of utility corporations without regard for the legitimate concerns or welfare of the tribes that own that land and the people who live on it;

• Provide that tribes would be entitled only to a one-time payment for the use of their lands, at prices fixed by the federal government, no matter how much benefit others derive from the use of the lands, or for how long tribes may be denied the use of their own lands;

• Give over the use of these trust lands in perpetuity, extinguishing the existing rights of tribal governments periodically to review, renegotiate and renew the terms for these rights of way at rates mutually agreed upon with the utilities.

The proponents of these changes so far have offered a diverse but disjointed rationale. In some quarters they invoke a claim of national security. But such an alarmist appeal to urgent and imminent peril has no meaning in relation to the construction of electrical transmission systems that require years of study and negotiation to construct. The national defense is not at risk when we are talking about projects designed primarily to serve new residential development.

Surely the need to protect tribal economic, cultural and historic interests deserves at least the same care and respect as the law requires developers to devote to protecting environmental resources.

Alternatively, they complain that having to pay for the use of Indian lands on an ongoing, renewable basis drives up the costs for consumers. But the cost of acquiring rights of way is a very small part of the cost of any energy project, whether initially or during operation, especially when compared with the profits these companies collect.

Moreover, federally licenses for capital-intensive energy projects always have been for limited terms (typically 50 years), with provision for periodic readjustment of annual charges. See, e.g., 16 U.S.C. §803(e). The miniscule costs of providing fair compensation to tribes for the use of their lands will be spread among millions of company stockholders and tens of millions of consumers, making any increased financial impacts truly negligible.

Of consumers' total energy bills, economists estimate that only six to nineteen percent goes to cover the costs of transportation. Right of way acquisition accounts for less than six percent of those transportation costs.

Rights of way on Indian lands, moreover, account for less than four percent of all the rights of way for energy in the U.S. Multiply those fractions and it turns out that rights of way on tribal lands only add up to 1.4 cents on a $100 monthly bill to the consumer.

Compare that to the considerable profits that energy companies collect every year:

Consolidated Statements of Income
Five year Summary
In Millions

	2005	2004	2003	2002	2001
Southern California Edison Company:					
Operating Revenue	$9500	$8448	$8854	$8706	$8126
Operating Expenses	- 7871	- 6435	- 7276	- 6579	- 3509
Operating Income	$1629	$2013	$1578	$2127	$4617
Income as a Percent of Revenue	17.1%	23.8%	17.8%	24.4%	56.8%
Sempra Energy:					
Operating Revenue	$11253	$9434	$7891	$6057	$7733
Operating Expenses	- 10142	- 8153	- 6948	- 5084	- 6719
Operating Income	$1111	$1281	$ 943	$ 973	$1014
Income as a Percent of Revenue	9.9%	13.6%	12.0%	16.1%	13.1%

Clearly the tribes are not the ones to blame for higher consumer costs.

Even more irresponsibly, the proponents of the 1813 study suggest that tribes in the past have prohibited the use of their lands for energy facilities and have even required the removal of existing facilities. But out of the thousands of rights of way that exist on Indian lands, they can only cite one instance in which a facility was removed after its right of way expired. That was the Yellowstone Pipeline that transported jet fuel across 56 miles of the Flathead reservation from 1954 to 1995.

The company there so mismanaged the facility that it leaked more than 170,000 gallons of fuel onto tribal lands and waters. These spills went unremediated and unrestored, while the company refused to engage in responsible negotiations regarding environmental cleanup, pipeline repair, and facility upgrade.

Most important, the parent company of the former owners of that pipeline have since stepped in and restored a responsible, professional relationship with the Confederated Salish and Kootenai Tribes of the Flathead Nation. Through mutual negotiation, the two sides have successfully cleaned up the two major spill sites, rehabilitated the abandoned right of way, and made arrangements for alternative transportation of fuel products across the reservation.

Far from an example of failure, the resolution of the Yellowstone Pipeline's problems effectively demonstrates just how well the current system is working.

Nevertheless, Thomas L. Sansonetti, a spokesman for the Fair Access to Energy Coalition, told a hearing on Section 1813 in Denver, March 7, 2006, that the history of what has been done to tribal lands is "*irrelevant to the future.*" Besides, he argued, *"The past will show any number of tribes that feel they were underpaid and an equal number of companies that feel they overpaid."*

On the contrary, we believe the documented history of exploitation and betrayal of the tribes matters quite a lot – to all Americans. Not only is there no basis whatever for Mr. Sansonetti's claim that utility companies in the past paid enough to make up for any injuries to the tribes. More important, there is no way of balancing those two by any scale of justice that any fair-minded member of Congress or the public would be likely to respect.

The organization Mr. Sansonetti represents is wholly funded by the El Paso Corporation. El Paso is spearheading the drive to persuade Congress to do away with tribal consent for rights of way.

But why would Congress want to undercut a basic protection for tribes that has been in place for nearly sixty years and that is now working just as Congress intended? Why would any members of Congress, moreover, want to align themselves on such a cause with a company that has as malicious a record of contempt for consumers as El Paso?

This is the company that, according to Southern California Edison, exploited the energy crisis in California by driving up natural gas bills in California by $1 billion and wholesale electricity costs by $2.7 billion.

This is the company that is paying back $1.625 billion to the consumers whose pockets they picked in California -- part of a settlement that California's Attorney General says will insure that "*El Paso will never be able to rip off Californians again.*"

Conclusion

The issues raised by the 1813 study do not involve national security, ratepayers' interests, or any of the other false claims made by its proponents. Rather, from our perspective in Indian Country, the questions that this study poses are much more fundamental.

- Does Congress wish to enact a further expansion of the power of eminent domain specifically for the benefit of this -- or any other -- private corporation?
- Does Congress wish to further erode the consent of the governed as a principle of good government?
- Is fairness to be weighed in this deliberation?
- What is the value of a federal promise?

Morongo's history demonstrates the progress that can be achieved when tribal consent is required. It also shows the consequences of a system that denies this fundamental protection.

This is not just an issue of concern to Indians. El Paso's efforts to take away the right of consent from all 567 tribes will disrupt the delicate relations that have been built up between state and tribal governments and utilities that serve them all across the country.

Accordingly, the members of the Morongo Band of Mission Indians urge Congress:

- To preserve a fair and well-established process of mutual negotiation and consent
- To protect the right of tribes to defend their interests against commercial encroachment
- To uphold the federal promise to respect tribal sovereignty

To this end, our tribal government has adopted the following statement of principles with respect to the 1813 study that we are urging Congress and the other tribal nations to support.

INDIAN TRIBES – PARTNERS IN AMERICA'S ENERGY FUTURE
SECTION 1813 RIGHT-OF-WAY STUDY
TRIBAL PRINCIPLES

1. **Reserved Lands.** Reservations today are all that tribes have left of what once was theirs alone. Reservations have enormous cultural significance to the continued existence of tribal communities. Reserved lands are held in trust by the United States for the exclusive use of tribes. And unlike other areas that may be suitable for rights of way, tribes cannot simply sell their lands for a right of way and move somewhere else, nor are reserved tribal lands readily exchangeable for other lands.

2. **Tribal Sovereignty and Consent.** The authority of tribal governments to control access by third parties to tribal lands without tribal consent is a critical element of tribal sovereignty that has been established in federal law and policy for over 200 years. The tribal consent requirement to the use of tribal lands must be honored and preserved.

3. **Conditions of Consent.** The tribal consent requirement includes the power of tribes to place conditions on the use of tribal lands, including conditions related to tribal jurisdiction, preservation of environmental and cultural resources, duration of use, and compensation.

4. **Benefits of Tribal Administration.** Adherence to the tribal consent requirement has resulted in greater energy production in Indian country and lower energy costs to consumers. The tribal consent requirement for rights-of-way has not had a noticeable negative effect on the availability or cost of energy to consumers.

5. **Best Practices.** Federal law and policy should provide positive incentives to tribes and industry to foster partnerships and the mutual alignment of economic interests related to energy development, transmission and distribution.

6. **Preservation of Tribal Jurisdiction.** No right-of-way agreement or other business arrangement that permits third-party use of tribal land should reduce the sovereign power of a tribe over its lands or the activities conducted on its lands in the absence of the specific consent of the tribe.

7. **Restricted Duration of Rights-of-Way.** Federal law and policy should not be changed to require perpetual rights-of-way or automatic renewals of rights-of-way because such changes would deprive tribes of management and control of their lands.

8. **Negotiated Compensation.** Tribes should continue to have the right to negotiate compensation for the use of tribal land that gives tribes a fair share of the economic benefits produced by use of their lands. Such revenues sustain tribal governments and cultures.

9. **Allottee Experience.** The creation of a federal administrative valuation process for fixing tribal right-of-way compensation would be an affront to tribal sovereignty and, as shown by the disastrous Federal mismanagement of Indian allottee resources, would be a mistake.

10. **Appropriate Deference.** As reflected in the Indian Tribal Energy Development and Self Determination Act of 2005, deference to tribal decision-making should remain a fundamental component of federal Indian energy policy.

11. **National Security.** Indian nations are an integral component of energy security of the United States, not a threat to that security. History demonstrates that tribes have permitted critical energy facilities to be used pending compensation negotiations, even in cases where tribal rights-of-way have expired.